88-794

No. _____

FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

GARY J. BRUEGGING,

Petitioner,

v.

DON W. WILSON,
Archivist of National Archives
and
NATIONAL ARCHIVES & RECORDS
ADMINISTRATION

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether an undefined and subjective job performance standard, applied solely to petitioner, can overcome a prima facie case of handicap discrimination under the Rehabilitation Act of 1973, as amended, 29 U.S.C.A. § 791 (1985 and Supp. 1988).

2. Whether the lower court erred, as a matter of Law, in holding that the National Archives and Records Administration ("NARA") had adopted and properly implemented an affirmative action plan tailored to the special needs of the handicapped employees in its employ, particularly those of petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Gary J. Bruegging ("Bruegging") prays that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment entered in this matter on June 28, 1988, adopting the memorandum opinion of the district court.

OPINIONS BELOW

The order of the court of appeals, unreported, appears in the Appendix to this Petition ("A") at 1a. The opinion of the United States District Court for the District of Columbia, unreported, appears in A.2a.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1988. A petition for rehearing and suggestion for rehearing en banc was denied on August 12, 1988. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Background

Most of the facts in this action were stipulated and, therefore, are uncontroverted. Bruegging was born with cerebral palsy. From birth he has suffered

motor control impairment.[1] Stipulated Facts, ¶1, A.23a. Cerebral palsy is defined by the Rehabilitation Act as constituting a "severe handicap." 29 U.S.C. § 706 15(A)(iii)(1988).

Bruegging was hired by the National Archives and Records Administration ("NARA") as a GS-5 on November 12, 1972. (Stip., ¶3, A.24a). Based on his status as a "severely handicapped person," he was given a Career Conditional Appointment under Schedule A, Section 213.3102(u) (Compl. ¶12; Ans. ¶12). Although a severely handicapped individual with cerebral palsy, Bruegging more than satisfied the criteria for a "qualified handicapped

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[1] The motor control impairment endemic to cerebral palsy causes obvious physical problems related to visual perception, including problems with letter reversals, accuracy and speed. E. Shaver & K. Mallik, Working With Cerebral Palsy 3-4 (1981).

individual." 29 C.F.R. § 1613.702(f)(1986). While his impairment substantially limits one or more of his major life activities, it does not impair his ability to perform the essential functions of his position. (Stip., ¶3, A.24a.)[2]

During the period from 1973 to and including 1976, Bruegging received annual promotions progressing from a GS-5 to a GS-9: (1) September 1, 1974 - Archives Technician, GS-6; (2) September 28, 1975- Legal Publications Specialist, GS-7; (3) October 10, 1976 - Technical Publications Writer/ Editor, GS-9. (Stip., ¶¶ 6-8, A.25a). As of October 10, 1977, Bruegging had sufficient time in grade as a GS-9 to

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2 Bruegging has received B.A. and M.A. degrees in Political Science, is progressing in paralegal studies and has received all A's in those courses except for one B. (Bruegging Trial Transcript 42.) Citations to Trial Transcript are "Tr." preceded by the last name of the witness.

make him eligible for promotion to a GS-11. (Stip., ¶10, A.25a.) For more than a decade, however, he received no promotion even though he had consistently been rated as "successful on all critical job elements of his position" during that period and despite the fact that the time for promotion from GS-9 to GS-11 at NARA ranges from a low of 1 year, 1 month to a high of 4 years, 7 months -- an average of approximately 2 years, 10 months. (Plaintiff's Ex. 16.) (Stip., ¶36, A.33a.)

Bruegging challenged his non-selection to promotion to a GS-11 in Vacancy Announcement ("VA") No. 84-12, which was filled in 1984. Two positions were available for that vacancy and eleven persons applied. Ten of those applicants, including Bruegging, were determined to be "best qualified" by a Merit System Panel.

(Stip., ¶¶ 13-14, A. 26a-27a.) Martha Girard, the selecting official, chose two persons over petitioner. (Stip., ¶15, A.27a.)

Due to the settlement of a grievance previously filed by Bruegging because of his non-selection to a prior GS-11 promotion, he was given "Priority Consideration" for the next announced GS-11 vacancy -- VA No. 85-12. (Stip., ¶20, A.28a.) A "Priority Consideration" requires "bona fide consideration for an appropriate vacancy given to an employee because of previous failure to properly consider the employee in a merit promotion action." (National Agreement, Ex. 3 at Section 9, emphasis added.) There were three vacancies to be filled in this position. (Girard Tr. at 196.) Martha Girard, who again was the selecting offi-

cial, did not select Bruegging despite the "Priority Consideration." (Stip., ¶21, A.29a.) Bruegging's evaluations rated him successful in overall job performance. (Plaintiff's Ex. 10). Despite Bruegging's successful rating (Girard Tr. 236-38), Girard decided to conduct her own separate evaluation of Bruegging by obtaining copies of work he had done over a several month period, reached a conclusion fundamentally inconsistent with the evaluations he had received up to that time and denied him promotion under the "Priority Consideration." (Girard Tr. 238-39; Plaintiff's Ex. 6.)

Bruegging was then considered competitively with five other applicants for the same three openings in VA 85-12. Three non-handicapped persons were selected by Martha Girard, and Bruegging was

again denied promotion. (Stip., ¶21, A29a.) None of the other candidates for these three positions, including four who were considered as being on the same par as Bruegging, were tested by having their recent work specially evaluated for accuracy by Martha Girard. (Girard Tr. 256-59.) One of those four were selected over Bruegging. (Girard Tr. 203.)

On appeal before the Court of Appeals, the government conceded, as it has throughout this action, that Bruegging was a "qualified handicapped individual" under applicable regulations. (Appellees' Motion For Summary Affirmance Before the Court of Appeals at 2.) At trial, the government conceded that Bruegging "has the capability . . . to do the job" of a GS-11 (See, e.g., Tr. 17-18.) and has stipulated that Bruegging "has been rated

successful in all the critical job-elements of his position" as a GS-9. (Stip., ¶36, A.33a.) Despite having conceded that Bruegging can do the kinds of things that a [GS] nine or eleven do. . .," the government attempted to shift its position by asserting that Bruegging has not been promoted because of the number of errors he committed. (Tr. 58.) Although the government attempted to retract a portion of the concession during trial, in its Post Trial Brief at page 3, note 3 the government stated:

> It is important that the Court understand precisely what defendants mean when they concede plaintiff is "qualified". Defendants do not contend that plaintiff's handicap prevents him from doing the editing and review work at the GS-11 level. Instead, they contend that his high level of errors at the GS-9 level coupled with the exacting requirements of accuracy at the GS-11 level and accompanying lack of supervision in that position, justify denial to

> plaintiff of the GS-11 positions at issue. Clearly plaintiff had the qualifications for the GS-11 positions in terms of service and experience. Merely being qualified, however, does not mandate selection especially where, as here, plaintiff made many errors at the GS-9 level and more qualified better applicants were available. Plaintiff's high level of errors do not happily mesh with the key elements of the GS-11 position that require accuracy of work. (Emphasis added.)

Significantly, NARA does not, and did not, have accuracy performance standards for a GS-11 or GS-9 (Plaintiff's Ex. 13.) Indeed, the government stipulated that: "NARA does not maintain a specific standard by which to measure errors or error rates of employees in the Office of the Federal Register." (Stip., ¶37, A.33a.)

NARA, which was an agency within the General Services Administration until April 1, 1985 (Stip., ¶¶ 4, 38, A.24a, 33a), does not have an affirmative action

plan that it adopted pursuant to Section 501(b) of the Rehabilitation Act, 29 U.S.C. § 791(1). (Bruegging Tr. 93.) Instead, it has submitted updates of the plan adopted by its predecessor agency, the General Services Administration. (See Defendant's Exs. 33 and 34.) The Office of the Federal Register ("OFR"), an entity within NARA, therefore does not have an affirmative action plan adopted pursuant to Section 501(b) of the Act, despite the fact that a rather high percentage of its employees -- 8.5 percent -- are handicapped. As a consequence, OFR has no guidelines or plan to follow in dealing with handicapped employees, particularly one such as Bruegging.

B. The Decisions Below

The court of appeals adopted the district court's opinion in granting the

government's motion for summary affirmance. The district court found that Bruegging had established a prima facie case of handicap discrimination under the Handicap Rehabilitation Act of 1973 by virtue of his qualification and consistent nonselection for promotion to GS-11 while nonhandicapped employees were selected instead. Mem. Opinion at 2, A.4a-5a. The court found that this prima facie case of discrimination was overcome because: (1) Bruegging failed to meet high job performance standards of accuracy; and (2) there was no proof that Bruegging's lack of accuracy was related to his handicap. Mem. Opinion at 5, A.11a-12a. The court also held that the agency had made appropriate accommodations to Bruegging's handicap by giving him a special parking spot, special telephone, smaller number of

tasks and weekly counselling sessions. Mem. Opinion at 6-8, A.13a-14a.

REASONS FOR GRANTING THE WRIT

1. Unrebutted Prima Facie Discrimination.

This case presents an issue of major significance in interpreting the Rehabilitation Act of 1973 and the requisites for overcoming a threshold finding of handicap discrimination. It is a case of first impression before this Court under the Act because the lower court permitted the government to overcome the prima facie case of discrimination with an undefined and subjectively applied performance criteria that was used solely to evaluate petitioner's performance. No other applicant for the same promotional opportunities was evaluated for promotion

under this criteria. Although the court correctly found a prima facie case of discrimination upon proof that Bruegging was a "qualified handicapped person" who was not selected for several GS-11 vacancies in favor of non-handicapped individuals (Mem. Op. at 2, A.3a-4a.) the court wrongly concluded that appellees met their burden by demonstrating their reliance on an undefined and subjectively applied high performance standard of "accuracy."[3] (Mem. Op. at 3, 9, A.7a, 19a-20a.)

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3 Under the Civil Service Laws job performance standards are improper unless based on objective criteria for promotion. 5 U.S.C. § 4302(b)(1). The trial court found ex post facto that accuracy of the highest degree was required even though there was no such requirement or standard indicated in the job performance standards for either GS-9 or GS-11. Plaintiff's Ex. 13. In the absence of any objective criteria for accuracy, there could be no rebuttal to the prima facie case of discrimination precisely because of the absence of a nondiscriminatory reason for nonselection. Player, Employment Discrimination Law § 7.13 (1988).

The court's approach is fundamentally at odds with Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981). Prewitt held that even a facially neutral job performance standard cannot rebut a prima facie case of discrimination where the job standard is applied arbitrarily or where the standard disparately affects a handicapped employee. Here, a subjective standard of accuracy was applied solely to Bruegging. Indeed, the standard was itself discriminatory because it was not defined as part of the GS-11 job description (Girard Tr. 178) and admittedly was not an objectively defined standard (Pontius Tr. 113, 114-16, 140-42). Under Prewitt, an undefined and subjective job performance standard cannot, as a matter of law, rebut a prima facie case of discrimination, especially

where, as here, it was applied solely to petitioner to deny him selection for promotion. Indeed, under circumstances where he should have been given "Priority Consideration" for promotion, Bruegging was not selected because of this subjectively applied and undefined accuracy standard.[4] A prima facie case of discrimination is meaningless if it can be overcome by a subjectively applied and undefined standard of performance.

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[4] The lower court's conclusion that there was no proof that Bruegging's accuracy was related to his handicap was clearly erroneous in view of the court's finding a prima facie case of handicap discrimination and the court's recognition that Bruegging had advised his superiors that his handicap affected his ability to correct his own errors. Mem. Op. at 5, n.3, A.12a. Moreover, that conclusion defies the extensive government evidence that every effort had been made to accommodate Mr. Bruegging's handicap as it affected his job performance.

2. The Absence of Affirmative Action.

The lower court also erred as a matter of law in ruling that NARA satisfied its affirmative action obligations under the Rehabilitation Act despite the fact that NARA, of which OFR is a part, never submitted an affirmative action plan of its own. The court reasoned that OFR met its obligations in this case because it employed more handicapped workers than average and because the government attempted to counsel Bruegging. (Mem. Op. at 8-9, A.18a-19a.)

Section 501 of the Rehabilitation Act "imposes a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion." Ryan v.

Federal Deposit Insurance Corp., 565 F.2d 762, 763 (D.C. Cir. 1977). The "legislative history of § 501 'demonstrates that Congress intended that the federal government be a model employer of the handicapped.'" Carter v. Bennett, 840 F.2d 63, 65 (D.C. Cir. 1988), quoting Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985). The statute by its clear and unambiguous terms provides that each federal agency must adopt an affirmative action plan "whereby the special needs of the handicapped employees are being met" including procedures "to provide adequate. . . advancement opportunities. . . ." 29 U.S.C. § 791(b). As set forth in applicable regulations promulgated by the Equal Employment Opportunity Commission, these affirmative action obligations impose a duty on the federal government to

make "reasonable accommodations" to an employee's handicap limitations. 29 C.F.R. § 1613.704.

In the present case, Bruegging set forth several alternatives which could reasonably accommodate his handicap: (1) restructure the GS-11 position to reduce the amount of required self-review; (2) provide specialized training or expert evaluation; or, (3) temporarily promote him to GS-11 on a trial run basis -- an alternative which the government's own witness conceded was a reasonable request. (Girard Tr. 219.)

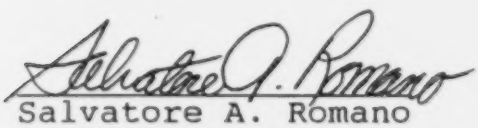
The government failed to carry its burden of demonstrating an inability to accommodate Bruegging. The statistical evidence relied upon by the district court was insufficient proof that NARA satisfied its obligations to adopt and implement an

affirmative action plan which reasonably accommodated employees with cerebral palsy. As other courts have properly noted, "'the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person'." Prewitt v. United States Postal Service, 662 F.2d at 307 quoting Gittler, Fair Employment and the Handicapped: A Legal Perspective, 27 DePaul L.Rev. 953, 972 (1978). One of the central questions in this petition is not whether NARA hired more than an average number of handicapped workers, but whether it abdicated its affirmative action obligations by failing to adopt guidelines and plans which create opportunities for employees like Bruegging to be promoted beyond the GS-9 level.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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Dated: November 9, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 88-5021 SEPTEMBER TERM, 1987

C.A. No. 86-03479

Gary J. Bruegging,

Appellant

v.

Frank G. Burke, in his capacity as Acting Archivist of the U.S. National Archives and Records Administration, et al.

BEFORE: Wald, Chief Judge; Mikva and Edwards, Circuit Judges

ORDER

Upon consideration of appellees' motion for summary affirmance, appellant's opposition thereto and appellees' reply, it is

ORDERED by the court that the motion be granted for the reasons stated by the district court in its Memorandum Opinion filed October 23, 1987.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY J. BRUGGING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 86-3479
	)	
FRANK G. BURKE,	)	
Acting Archivist, ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM

After a full bench trial and consideration of post-trial briefs, the Court enters the following findings of fact and conclusions of law in this handicap discrimination case.

Mr. Bruegging is employed as a GS-9 in the Office of Federal Register ("OFR"), a unit of the National Archives and Records Administration ("Archives"). He

is a qualified handicapped individual[1] by reason of his cerebral palsy which causes a hand tremor, affects his speech somewhat, and influences his gait.

Mr. Bruegging contends he failed promotion because of his handicap on several occasions. He also urges that Archives has not fulfilled its affirmative action obligations as an employer in its relations with him as an employee under Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C.A § 791 (1985 & Supp. 1987)).

A routine prima facie case was established by showing that on several occasions Mr. Bruegging qualified for

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[1] "Qualified handicapped individual" is defined at 29 C.F.R. § 1613.702(f) (1987) as one "who with or without reasonable accommodation can perform the functions of the position in question without endangering the health and safety of others...."

GS-11 vacancies that opened at OFR in the competitive service, that he applied but was not selected and a non-handicapped individual was chosen.

In 1972 Mr. Bruegging began his career at Archives in a temporary position and by October 1976 was promoted to Legal Publications Specialist GS-9. In March 1979 his position was converted to the Career Competitive Service. On October 10, 1977 he became eligible to compete for GS-11 positions. Thereafter, he failed selection for GS-11 vacancies on five occasions he has placed in issue here between July 1984 and March 1987. He has remained a GS-9 and presently his position, as retitled, is Technical Publications Writer/Editor, OFR Finding Aids Unit where he edits the table of contents of the daily Federal Register

under GS-11 supervision and handles some of the many telephone inquiries.

Mr. Bruegging and others in OFR working on the several publications of the Federal Register are held to an exacting, well above average standard of accuracy. These publications cannot serve their important governmental purpose if mistakes appear by way of miscitations, incomplete or incorrect cross-references, omissions, and the like. As a GS-9 Mr. Bruegging's work has been subject daily to detailed review for accuracy by others. As a GS-11 he would be personally responsible for final editing with direct authority to release material to the printer. His tendency on repeated occasions to make often significant errors has led selecting officials to choose other employee applicants over Mr. Bruegging, whose

overall performance and accuracy were deemed clearly superior.

Each GS-11 job for which Mr. Bruegging applied was such that accuracy was job related and outstanding ability in this regard was required as a matter of business necessity. The Court is wholly satisfied that the extensive testimony of the selection officials was in each instance credible. Each selection placed in issue by the complaint was thoroughly reviewed against underlying documents which completely reinforced testimony of the selecting officials and other supervisors. There was no evidence of discrimination. Their choice of others over Mr. Bruegging for superior accuracy and because of overall superior qualifications was not protected.

Five selections for promotion to GS-11, each advertised by a Vacancy Announcement ("VA") are in issue in this proceeding, to wit: VA 84-12 (two selected July 19, 1984); VA 85-12 (three selected April 30, 1985); VA 85-24 (one selected May 14, 1985); VA 85-37 (one selected November 5, 1985); VA 87-12 (one selected March 12, 1987).

One handicapped person (hearing) was chosen in VA 84-12. In VA 85-12 Mr. Bruegging was given priority consideration by reason of a union grievance but was unsuccessful after detailed and sympathetic consideration by the selecting official. Later, when his application was considered against competitors, he again failed selection. In VA 85-24 the selectee was handicapped from cerebral palsy and this selection cannot be

considered because Mr. Bruegging never contacted the Equal Employment Opportunity Commission. In VA 85-37 and VA 87-12 neither selectee was handicapped. Three different selecting officials were separately involved in one or more selections.

In all instances Mr. Bruegging was among the best qualified and his record was carefully reviewed. Competition for the positions was keen. The selecting officials were familiar with most applicants' work, partly because of the constant checking and cross-checking that occurs between GS-11 supervisors and GS-9's to eliminate errors and to be sure of absolute accuracy. In all instances the ratings of those selected were superior to Mr. Bruegging's ratings in significant respects. He lost out on the

one occasion he received priority consideration under the union grievance procedure because his supervisor, who had worked with him to decrease errors and who had demonstrated unusual interest in creating job opportunities for handicapped persons, found him not qualified for GS-11 responsibility due to his inability to perform consistently accurate work and his substantial errors.

This is an unfortunate case. Mr. Bruegging is a fine public servant. He has worked steadily and given satisfactory service. It is natural that his long tenure at GS-9 disturbs him. Others doing the same kind of work, both handicapped and nonhandicapped, have advanced to higher grades in much shorter time at OFR. But grade promotion in the competitive service is based on performance, not

tenure. Accuracy is the number one critical element and an essential job requirement for a GS-11 working at OFR. It is apparent from concrete examples of Mr. Bruegging's day-to-day work and other proof of record that Mr. Bruegging has been unable to meet this crucial element of a GS-11 position.[2] Moreover, it must

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[2] Throughout, Mr. Bruegging has requested a statement specifying the precise standard of accuracy he is required to meet. There is none but it is clearly something more exacting than average. It is not, as the prof indicated, a matter of counting. Some errors of spelling, for example, may be less important than errors of substance that make the Federal Register ineffective for lack of adequate legal notice. Mr. Bruegging has not only continued to make frequent substantive errors but his performance is erratic and hence unpredictable. He is correct one day and incorrect the next day on the same item. He repeats errors brought to his attention. Selecting officials must not be put into some kind of numerical straight jacket but should be allowed to apply judgment to written appraisals where supported, as in this instance, by defective work product and personal knowledge of the selecting official that leaves no doubt an applicant cannot meet an essential job-related standard.

be noted that there is absolutely no clear proof[3] of any kind indicating that his lack of accuracy is the result of or related in any way to his cerebral palsy. Without such proof, there would not appear to be even a colorable case presented here.

Given these deficiencies, plaintiff's counsel has taken an alternative approach which must be considered. His brief states that "affirmative action is the heart and soul of this case" (Plaintiff's Brief, p. 16), and urges that some effort

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[3] The most the record shows is that Mr. Bruegging stated to one of his supervisors that someone at HUD with cerebral palsy said that "catching one's own mistakes is a common problem for victims of cerebral palsy." When Mr. Bruegging indicated to a supervisor that his inaccuracy seemed to reflect days his coordination was "worse," he was advised to inform his supervisor and take a rest if this occurred. Thereafter he apparently never did. Defendant's Exhibit 1, Tab 10.

beyond nondiscrimination and reasonable accommodation is mandated by the Rehabilitation Act of 1973, as amended, when handicapped individuals are thwarted by failures to promote.

Even assuming that there is an obligation to accommodate a performance defect not demonstrated as related to an individual's handicap,[4] accommodations were made for Mr. Bruegging's palsy. He was not required to perform the same volume of work as his GS-9 colleagues, he was assigned tasks that avoided numbers to minimize the possibility of mistake, he was given special parking, telephone equipment and an improved typewriter as soon as available. Weekly counselling sessions went forward until he refused to

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[4] The Court does not so hold.

continue them. His supervisors regularly made sure he was informed of his errors and given opportunity to discuss them along with suggestions as to how he should improve.

Nonetheless, the Court is urged to find as a matter of law that these accommodations were not enough because under Section 501 of the act more affirmative action is required. It is suggested that Archives should not have refused Mr. Bruegging the aid of "a rehabilitation or similar expert"; that he should have been given a "trial period" to do the work of a GS-11, presumably without qualifying competitively; and that the duties of a GS-11 position itself could have been changed to minimize the effect of his tendency to error.

Since a high degree of accuracy is an essential requirement of all GS-11 positions at OFR, OFR is not required by Section 501 or otherwise to lower its high standard of accuracy because Mr. Bruegging cannot meet them. Moreover, GS-11's presently check his work for accuracy and counsel him. The "trial period" concept would necessitate the same supervision and necessarily the same result and would accomplish nothing. In these respects, at least, plaintiff's counsels concept of affirmative action is carried too far. Cf. Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981).

The question remains whether Archives has met its burden of establishing that all reasonable accommodation has been attempted to alleviate Mr. Bruegging's

error performance. Plaintiff's counsel offered expert testimony suggesting that possibly Mr. Bruegging, who has the capacity to learn, would be aided by regular weekly follow-up sessions.

There is nothing in the record that explains Mr. Bruegging's inconsistent and sometimes significantly erroneous performance. Thus there is no indication beyond this follow-up suggestion as to how his work product could be made more error free. The expert purported to assess Mr. Bruegging's tendency to err and believed it was average. If so, average is well below the OFR standard for GS-11 which is not surprising given the exacting nature of Federal Register work. Furthermore, the expert's suggestion there may have been "too little feedback" is based on limited observation and is not supported

by the proof. The proof demonstrated that Mr. Bruegging received far more than that until he resented the close attention and refused weekly reviews. Thereafter his errors were identified to him and reviewed continuously in an effort to improve his performance. Thus there is no proof that anything could be done that was not attempted affirmatively to advance Mr. Bruegging to GS-11.

Like all federal agencies, Archives is required in a broad sense to avoid handicap discrimination and to increase the participation of handicapped employees by their hiring, placement and promotion policies. They have done this commendably well in the very area where Mr. Bruegging works.[5] Archives has had an exemplary

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[5] If, as it appears, Mr. Bruegging has reached his full potential for promotion with the Federal

(continued...)

record in furthering job opportunities for the handicapped. Of OFR's 70 employees, 8.5% are handicapped; three are GS-12 and one is GS-11. This compares with the Federal Government average of 1.01%. Archives as a whole has a 2.85 percentage. Ruth Pontius, Mr. Bruegging's unit chief, has been unusually interested and continuously helpful to him. Handicapped herself, she has had long experience and professional interest in problems of the handicapped. Throughout his work experience in her unit Mr. Bruegging has

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5 (...continued)
Register, it is possible some other position is available in Archives where he can advance. At one point Archives explored this possibility and found no vacancy available. Whether there are positions, if vacant, for which Mr. Bruegging could qualify for consideration does not appear and plaintiff's counsel makes no such claim. Archives made a consciously generous effort to assist Mr. Bruegging to obtain a jo! in other agencies from time to time when he applied.

been treated by her and others with respect, understanding and extraordinary personal attention in a continuing effort to assist him. Both the letter and spirit of the law have been met.

While Mr. Bruegging has sought to better himself, obtaining post-college graduate training and undoubtedly doing his best, he has not been able to avoid inaccuracy in his work. His tendency to err has prevented him from advancing after all known efforts to correct this tendency have been exhausted.

The claims of discrimination based on non-selection for GS-11 must fail. Mr. Bruegging failed to perform the critical and essential elements of the GS-11 positions. Archives has met its burden to demonstrate that all possible accommoda-

tion was made and that the agency met its affirmative action obligations.

Judgment shall be entered for the defendants and the complaint dismissed, with prejudice. The Clerk of Court shall enter judgment accordingly. It would be inappropriate to assess costs in this case.

s/Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

October 23, 1987.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

GARY J. BRUGGING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 86-3479
	)	
FRANK G. BURKE,	)	
Acting Archivist, ET AL.,	)	
	)	
Defendants.	)	

This cause having come on for trial before the Court without a jury on September 24, 1987, the issues having been duly tried, and the Court having his day filed a Memorandum constituting its findings of fact and conclusions of law,

IT IS ORDERED AND ADJUDGED

That judgment is entered for defendants, the complaint dismissed with prejudice and no costs will be assessed.

JAMES F. DAVEY, Clerk

By: _____
Deputy Clerk

By Direction of
GERHARD GESELL
U.S. District Judge

UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY J. BRUEGGING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 86-3479 GAG
	)	
FRANK G. BURKE,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

STIPULATED FACTS

The parties hereby stipulate that the following facts are not in dispute in this case.

1. Plaintiff, born July 21, 1945 has since birth been handicapped with cerebral palsy. This condition causes plaintiff some speech and motor control impairment.

2. Cerebral palsy is one of a number of handicapping conditions characterized at one point in the Rehabilitation Act by the term "severe handicap". See 29 U.S.C. 706(13).

3. Plaintiff was hired by the National Archives and Records Administration ("NARA") on November 13, 1972 as an Archives Technician, GS-1421-5, temporary. He is, and at all applicable times has been, a qualified handicapped person as that term is defined pursuant to the Rehabilitation Act of 1973, 29 U.S.C. 701, et. seq.

4. At that time NARA was an agency within the General Services Administration ("GSA").

5. Plaintiff's position was converted to Excepted Appointment, Career Conditional on February 18, 1973.

6. Plaintiff was promoted to the position of Archives Technician, GS-6 on September 1, 1974

7. Plaintiff was promoted to the position of Legal Publications Specialist, GS-7 on September 28, 1975.

8. Plaintiff was promoted to the position of Legal Publications Specialist, GS-9 on October 10, 1976.

9. Plaintiff's Schedule A Excepted Appointment was converted to a Competitive Service Career Conditional Appointment on March 25, 1979.

10. As of October 10, 1977 plaintiff possessed sufficient time in his grade at the GS-9 level to make him eligible to apply and be considered for GS-11 positions.

11. Plaintiff is currently employed as a GS-9 Technical Publications

Writer/Editor in the Office of Federal Register, Finding Aids Unit. This position was recently retitled from the title Legal Publications Specialist pursuant to new requirements issued by the Office of Personnel Management ("OPM").

12. Plaintiff is contesting in this civil action only five promotion actions of persons other than him for GS-11 positions to which he applied. These five selections were made by NARA on July 19, 1984, April 30, 1985, May 14, 1985, November 5, 1985 and March 12, 1987.

13. The first contested non-selection of plaintiff concerns Vacancy Announcement ("VA") No. 84-12 in which the plaintiff was not selected for the position of Legal Publication Specialist GS-950-11.

14. Eleven persons, including plaintiff, applied pursuant to VA No. 84-12. Two positions were available. Ten of those eleven persons, including plaintiff, were determined to be "best qualified" by a Merit Systems Panel.

15. The selecting official for VA No. 84-12 was Martha Girard. The two persons she selected under VA No. 84-12 were Mildred Isler and Melanie Williams.

16. Mildred Isler is not a handicapped employee. Melanie Williams is a handicapped employee who suffers from a hearing impairment. Melanie Williams was selected with a priority consideration determination.

17. Plaintiff timely filed an EEO complaint regarding his non-selection under VA No. 84-12 in which he alleged discrimination based upon his handicap.

18. The second contested non-selection by plaintiff concerns VA No. 85-12 in which the plaintiff was not selected for the position of Legal Publications Specialist GS-950-11.

19. Six persons, including plaintiff, applied pursuant to VA No. 85-12. Three positions were available. Since only six persons applied, no Merit Systems Panel met to assemble a Best Qualified List and all applicants were considered for the positions.

20. Due to the settlement of a previous grievance filed by plaintiff, he had "Priority Consideration" in his application submitted under VA No. 85-12. Because plaintiff had priority consideration he was initially considered non-competitively by the selecting official,

Martha Girard. She determined to not select plaintiff on March 26, 1985.

21. Plaintiff was then considered by Ms. Girard competitively along with the other five applicants. The three persons she selected under VA No. 85-12 were Laurice A. Clark, Beverly D. Fayson and Ina C. Masters. None of these selectees is handicapped.

22. Plaintiff timely filed an EEO complaint regarding his non-selection under VA No. 85-12 in which he alleged discrimination based upon his handicap.

23. The third contested non-selection by plaintiff concerns VA No. 85-24 in which the plaintiff was not selected for the position of Legal Publications Specialist GS-950-11.

24. Five persons, including plaintiff, applied pursuant to VA No. 85-

24. One position was available. Since only five persons applied, no Merit Systems Panel met to assemble a Best Qualified List and all applicants were considered for the position.

25. Two of the five applicants, Laurice Clark and Ina Masters, later declined consideration for the position because they were selected under VA No. 85-12.

26. The selecting official for VA No. 85-24 was Robert E. Lewis. The person he selected under VA No. 85-24 was William King Banks.

27. William King Banks is a handicapped employee who suffers from Cerebral Palsy.

28. The fourth contested non-selection by plaintiff concerns VA No. 85-37 in which the plaintiff was not

selected for the position of Legal Publications Specialist GS-950-11.

29. Four persons, including plaintiff, applied pursuant to VA No. 85-37. One position was available. Since only four persons applied, no Merit Systems Panel met to assemble a Best Qualified List and all applicants were considered for the position.

30. The selecting official for VA No. 85-37 was Brenda Robeson. The person she selected under VA No. 85-37 was Sheila P. Jennifer. Ms. Jennifer is not handicapped.

31. Plaintiff timely filed an EEO complaint regarding his non-selection under VA No. 85-37 in which he alleged discrimination based upon his handicap.

32. The fifth contested non-selection by plaintiff concerns VA No.

87-12 in which the plaintiff was not selected for the position of Technical Publications Writer/Editor GS-1083-11.

33. Four persons, including plaintiff, applied pursuant to VA No. 87-12. One position was available. Since only four persons applied, no Merit Systems Panel met to assemble a Best Qualified List and all applicants were considered for the position.

34. The selecting official for VA No. 87-12 was Richard Claypoole. The person he selected under VA No. 87-12 was Janice E. Booker. Ms. Booker is not handicapped.

35. Plaintiff timely filed an EEO complaint regarding his non-selection under VA No. 87-12 in which he alleged discrimination based upon his handicap.

36. Plaintiff has been rated successful on all critical job elements of his position while employed by NARA.

37. NARA does not maintain a specific standard by which to measure errors or error rates of employees in the Office of Federal Register.

38. NARA was an agency within GSA until April 1, 1985.

39. This Court has jurisdiction over this civil action and venue is proper in this district.

Respectfully submitted,

s/Francis R. Ridley
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D.C. Bar #149740

s/Joseph E. Digenova
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